FCC 96-154

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 | ) | CS Docket No. 96-85 |
| | ) | |
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# ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: April 5, 1996 Released: April 9, 1996

By the Commission: Commissioners Quello and Chong issuing separate statements.

Comment Date: May 28, 1996
Reply Comment Date: June 28, 1996

## Table of Contents


| | | Paragraph |
|---|---|---|
| I. | INTRODUCTION | 1 |
| II. | ORDER | 5 |
| | A. Effective Competition | 5 |
| | B. CPST Rate Complaints | 19 |
| | C. Small Cable Operators | 23 |
| | D. Uniform Rate Requirement | 33 |
| | E. Subscriber Notice | 37 |
| | F. Technical Standards | 40 |
| | G. Buy Out Prohibitions | 43 |
| | H. Program Access | 46 |
| | I. Sunset of Upper Tier Rate Regulation | 49 |
| | J. Definition of "Cable System" | 51 |
| | K. Definition of "Cable Service" | 58 |
| | L. Cable Operator Refusal To Carry Certain Programming | 61 |
| III. | NOTICE OF PROPOSED RULEMAKING | 68 |

A. Effective Competition ..... 69
B. CPST Rate Complaints ..... 78
C. Small Cable Operators ..... 80
D. Definition of "Affiliate" In The Context of Open Video Systems and Cable-Telco Buy Outs ..... 95
E. Uniform Rate Requirement ..... 97
F. Technical Standards ..... 101
G. Prior Year Losses ..... 105
H. Advanced Telecommunications Incentives ..... 109
I. Cable Operator Refusal To Carry Certain Programming ..... 110
J. Other Matters ..... 112

IV. REGULATORY FLEXIBILITY ANALYSES ..... 113
A. Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking ..... 113
B. Final Analysis for the Report and Order ..... 122

V. INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS ..... 126

VI. EFFECTIVE DATE ..... 127

VII. PROCEDURAL PROVISIONS ..... 128

VIII. ORDERING CLAUSES ..... 132

APPENDIX A
APPENDIX B

## I. INTRODUCTION

1. In this item we amend the Commission's rules relating to cable television to conform them to changes in the Communications Act enacted, on February 8, 1996, in the Telecommunications Act of 1996 (the "1996 Act").[1] In addition, we propose further rules to the extent necessary to implement various provisions of the 1996 Act. Finally, because many of these statutory provisions were effective upon enactment, we establish interim rules to govern implementation of the 1996 Act pending adoption of final rules.

2. Our intent in this item is to conform our rules promptly to statutory

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, approved February 8, 1996.

requirements that are already in effect, to bring certainty to cable operators and local regulators, and to achieve as quickly as possible the deregulation intended by Congress. Further, we seek to streamline our procedural regulations and, of course, to continue to protect consumers, consistent with congressional intent.

3. Much of the 1996 Act consists of clear, self-effectuating revisions to prior federal statutory provisions. The *Order* portion of this item conforms our rules to meet these new statutory requirements. We are revising these rules without providing prior public notice and an opportunity for comment because the rule modifications are mandated by the applicable provisions of the 1996 Act. We find that notice and comment procedures are unnecessary, and that therefore this action falls within the "good cause" exception of the Administrative Procedure Act.[2] The final rules adopted in this *Order* do not involve discretionary action on the part of the Commission. Rather, they simply implement provisions of the 1996 Act according to the specific terms set forth in the legislation.

4. Other provisions of the 1996 Act are already effective, but require further rulemaking in order to be fully and clearly implemented. The *Notice* portion of this item addresses these issues. As we initiate those rulemakings herein, we find it in the public interest to adopt interim rules immediately and find good cause to establish them without the benefit of the traditional notice and comment process. Of course, our final rules will be crafted to take into account public comment to the same extent as would be the case in a rulemaking that was not preceded by the adoption of interim policies. However, we intend the interim rules to create a safe harbor, i.e., operators can be assured that if they comply with these interim rules, their behavior will not later be subject to challenge based upon the ultimate outcome of the rulemaking.

## II. ORDER

### A. Effective Competition

#### *1. Final Rule Change*

5. Since passage of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), regulation of cable television has been guided by Congress's intent to "rely on the marketplace, to the maximum extent feasible . . . ."[3] The 1992 Cable Act required the Commission to prescribe rate regulations that protect subscribers from having to pay unreasonable rates by ensuring that rates for regulated services do not

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[2] 5 U.S.C. § 553(b)(B).

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), § 2(b)(2). The 1992 Cable Act amended Title 6 of the Communications Act, as amended, 47 U.S.C. § 521 et seq. ("Communications Act").

exceed rates that would be charged in the presence of effective competition.[4] Thus, regulations governing the rates charged for cable services do not apply to cable systems that actually face effective competition.[5] For a system that is not subject to effective competition, the Commission is obligated to ensure the reasonableness of rates charged for the basic service tier ("BST") and for the cable programming service tier ("CPST").[6] The BST, which a subscriber must purchase in order to have access to any other tier of service, must include all of the local broadcast television stations that the operator offers over its system, plus any public, educational, or government access channels that the operator is required to provide to subscribers under the terms of its franchise.[7] A CPST is any tier of programming, other than the basic service tier, that a cable operator offers.[8] Where effective competition is present, certain other regulatory requirements also become inapplicable, including the uniform rate requirement,[9] the "tier buy through" requirement,[10] and certain of the ownership rules.[11]

6. Section 76.905(b) of our rules incorporates the statutory definition of "effective competition" as set forth in the 1992 Cable Act.[12] Pursuant to that rule, a system is subject to effective competition in the area covered by its local franchise if any one of the following three tests are met:

> (1) Fewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system.
>
> (2) The franchise area is:
>
> (i) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and
>
> (ii) the number of households subscribing to programming services

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[4] Communications Act, § 623(a)(2).

[5] *Id.*

[6] *Id.*

[7] Communications Act, § 623(b)(7)(A).

[8] *Id.*, § 623(l)(2).

[9] *Id.*, § 623(d).

[10] *Id.*, § 623(b)(7).

[11] *See* 1996 Act, § 202(i), *to be codified at* Communications Act, § 613(a)(3); Order in CS Docket No. 96-56, FCC 96-112 (rel. March 18, 1996).

[12] 47 C.F.R. § 76.905(b); *see* Communications Act, § 623(l)(1).

offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area.

(3) A multichannel video programming distributor, operated by the franchising authority for that franchise area, offers video programming to at least 50 percent of the households in the franchise area.[13]

7. The three effective competition test categories described above are not altered by the 1996 Act. However, Section 301(b)(3) of the 1996 Act creates a fourth test, finding that effective competition exists when video programming is offered by, or over the facilities of, a local exchange carrier ("LEC")[14] or its affiliate. Thus, effective competition now exists if a:

> local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.[15]

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[13] 47 C.F.R. § 76.905(b). With respect to the second test for effective competition, the Commission concluded that in determining whether 15% of households in the franchise area subscribe to cable services, "only those multichannel video programming distributors that offer programming to at least 50 percent of the households in the franchise area should be included . . . ." *Report and Order and Further Notice of Proposed Rulemaking* ("*Rate Order*") in MM Docket 92-266, FCC 93-177, 8 FCC Rcd 5631, 5664-65 (1993). On review, the court in *Time Warner Entertainment Co. v. FCC* concluded that Congress intended to include the subscribers of all multichannel video programming distributors ("MVPDs") offering service in the franchise area, not just those offering service to 50% of the households in the area, in applying the 15% threshold. 56 F.3d 151, 189 (D.C. Cir. 1995). The Commission will address the decision of the Court in a separate proceeding.

[14] Section 3(a) of the 1996 Act defines "local exchange carrier" as follows:

> The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such a person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

1996 Act, § 3(a), *to be codified at* Communications Act, § 153(r).

[15] 1996 Act, § 301(b)(3)(C), *to be codified at* Communications Act, § 623(l)(1)(D).

This provision was effective upon enactment. Therefore, we amend our rules to incorporate this additional prong of the definition of effective competition. While we believe that further clarification is needed to fully implement this provision on a permanent basis,[16] in the following sections we adopt interim rules regarding certain definitional and procedural issues. Consistent with Section 623 of the statute, we seek to adopt interim and permanent rules that will allow the Commission to determine when the level of competition provided by a LEC or its affiliate is sufficient to have a restraining effect on cable rates.[17]

*2. Definitions of "offer" and "in the franchise area"*

8. The Commission's pre-existing definition of "offer" will apply under the new test for effective competition:

> Service of a multichannel video programming distributor will be deemed offered: (1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and (2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.[18]

9. The legislative history to the 1996 Act indicates congressional intent to apply this definition of "offer" for purposes of the new test for effective competition.[19]

10. An operator should focus on each element of the "offer" definition, in the context of the new test for effective competition, when attempting to prove that the service offered by the LEC affiliated MVPD is effective in restraining cable rates. For example, a cable operator seeking to prove effective competition will have to show that the competitor is "physically able" to offer service to subscribers "in the franchise area." Where the competitor's service area does not follow the borders of the local cable franchise areas, a cable operator should describe the extent of the overlap between its franchise area and the

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[16] *See infra* at Sec. III. A.

[17] Communications Act, § 623; *see* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 62 (1992).

[18] 47 C.F.R. § 76.905(e).

[19] Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996) ("Conference Report").

actual or planned service area of the competitor. With respect to multichannel multipoint distribution service ("MMDS"), for example, we previously have determined that the potential subscribers include only those who reside in "areas to which the MMDS operator is capable of providing video programming."[20] We note that the zone in which our rules protect a MMDS licensee from harmful electrical interference is a circle with a radius of 35 miles centered on the MMDS transmitter site.[21] Thus, in seeking to establish effective competition from a LEC-affiliated MMDS operator, a cable operator should provide the location of the MMDS transmitter and the 35-mile protected zone. The cable operator also should provide any other reasonably available technical and geographic information, as well as information about the geographic scope of the competitor's marketing efforts, to help establish that service is being offered to subscribers in the franchise area. Such data, whether with respect to a MMDS operator or some other LEC-affiliated MVPD, will also be relevant to a showing that there are no technical or other impediments to households taking service from the MVPD. Where appropriate, we will request additional relevant information from the competing MVPD.

11. In addition, the cable operator must establish that "potential subscribers in the franchise area are reasonably aware" that they may purchase the competitor's service. The marketing efforts of the LEC or its affiliate often will be directly related to this issue. As we previously have observed, "potential subscribers may be made reasonably aware of the availability of a competing service, for example, through advertising in regional or local media, direct mail, or any other marketing outlet."[22] Thus, cable operators may rely on marketing information to the extent necessary to show consumer perceptions of the availability and comparability of the competing service. Again, the Commission may seek information directly from the competitor in appropriate circumstances.

*3. Definition of "comparable programming"*

12. The legislative history reveals Congress's intent that video programming be deemed "comparable" for purposes of this test if the competing service "includes access to at least 12 channels of programming, at least some of which are television broadcasting signals."[23] Although we solicit comment as to this definition, on an interim basis we will require the broadcast programming to include the signals of local broadcasters. Broadcast programming delivered by satellite (e.g., "superstations") shall not be deemed broadcast programming for purposes of the interim application of the new effective competition test.

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[20] *Rate Order*, 8 FCC Rcd at 5658, n. 90.

[21] 47 C.F.R. § 21.902(d).

[22] *Rate Order*, 8 FCC Rcd at 5656-57.

[23] Conference Report at 170.

### 4. *MMDS Provision of Local Broadcast Channels*

13. The definitions of "offer" and "comparable programming" require us to address a further question that arises specifically in the context of MMDS. An MMDS operator has two ways of ensuring that its subscribers receive local broadcast programming. The operator can pull in the broadcast signals itself via its own centrally located broadcast antenna and then retransmit the entire package of broadcast and non-broadcast signals to the microwave antenna located at the subscriber's residence, or the operator can install a separate broadcast antenna to complement the microwave antenna at each subscriber location. We must determine whether the wireless cable operator should be deemed to be "offering" broadcast programming in the latter situation, i.e., when the operator does not transmit the broadcast signals to the subscriber via microwave. In that situation, the operator must join the broadcast signals to the microwave signals at some point. One approach is to join those signals in a single cable that runs to the back of the customer's television set or to a settop converter box. Another approach is to run separate cable lines from each antenna to an A/B switch from which a single line is connected to the television set. The subscriber pushes the switch back and forth between the A position and the B position, depending upon whether the subscriber wants to see the broadcast channels or the microwave channels.

14. On an interim basis, we will resolve this issue as follows. If the broadcast channels are available to the subscriber without an A/B switch or similar device, the MMDS operator will be deemed to be offering them within the meaning of Section 301(b)(3) of the 1996 Act. If an A/B switch or similar device is required, we will still deem the broadcast stations offered if the MMDS operator is responsible for the installation. However, if the customer must install his or her own A/B switch to receive the broadcast channels, the MMDS operator will not be deemed to be offering those channels. Inclusion of broadcast channels on the MMDS operator's rate card, advertising, or other marketing materials may be evidence that the MMDS operator offers the broadcast channels in accordance with our definition of "offer." We note the significance of marketing materials because it is arguable that an MMDS operator that markets itself as a provider of local broadcast channels will take the steps necessary to ensure that subscribers receive those channels. In those circumstances, the broadcast channels would seem to be a part of the programming package that the MMDS operator is offering and providing, regardless of the technical means employed.[24]

### 5. *Definition of "affiliate"*

15. Under our interim rules implementing this statute, an entity will be considered affiliated with a LEC if it meets the definition of "affiliate" set forth in Section 3 of the 1996 Act:

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[24] Nothing herein affects the determination of when an MVPD must obtain retransmission consent with respect to local broadcast signals. *See* 47 C.F.R. § 76.64(e).

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.[25]

16. We note that this definition of "affiliate," which has been incorporated in Title I of the Communications Act, does not strictly apply to matters under Title VI, since Title VI contains a separate definition of that term that does not set a percentage threshold as to what constitutes ownership.[26] We believe this gives us discretion to establish an ownership threshold other than 10% for purposes of Title VI. However, because a determination of the precise threshold must await the rulemaking we initiate in the accompanying *Notice*, on an interim basis we find it reasonable to use the Title I ownership threshold that Congress has prescribed for purposes of most other provisions of the Communications Act. Therefore, effective competition under the new test may be established when a LEC owns an active or passive equity interest, or the equivalent thereof, of more than 10% in the competing MVPD. We will determine what constitutes the "equivalent" of an equity interest on a case-by-case basis. Affiliation also can be shown through de facto control, regardless of the actual ownership interest.[27] The ownership threshold we adopt in the interim does not in any way preclude the establishment of a permanent rule that incorporates a different threshold.

*6. Procedures*

17. A cable system that meets all of the relevant criteria in the new effective competition test is exempt from rate regulation as of February 8, 1996, the date the 1996 Act was enacted. Such an operator may file a petition for a determination of effective competition with the Commission.[28] The petition should demonstrate that all the relevant criteria are satisfied. We note that, by necessity, we have adopted the substantive requirements discussed above on an interim basis without the usual notice and comment proceeding. Accordingly, petitioners seeking a declaration of effective competition under the new test are free to provide additional information, consistent with the statute, that the operator believes evidence the existence of effective competition that must exist in order to exempt an operator from rate regulation.

18. This petition may be filed with the Commission at any time, including in

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[25] 1996 Act, § 3(a)(2), *to be codified at* Communications Act, § 3(33).

[26] Communications Act, § 602(2).

[27] *See* 47 C.F.R. § 76.501, Note 1.

[28] *See* 47 C.F.R. § 76.7.

response to a notice from the LFA that it intends to file a CPST rate complaint.[29] (A LFA certified to regulate rates can simply withdraw its certification at any time if it believes the cable operator is subject to effective competition, or for any other reason.[30]) The operator shall provide a copy of the petition to the LFA. The Commission will provide public notice of the petition's filing to enable interested parties to file responses to the petition. Thereafter, we will determine whether effective competition exists and may issue an order granting the petition. As we have noted, the Commission may issue an order directing one or more persons to produce information relevant to the operator's petition. For example, the order may be directed to a LEC that is asserted to hold an interest in an MVPD sufficient to reach affiliation levels that would trigger a finding of effective competition. The Commission will act promptly on these petitions. A Commission determination regarding effective competition will be applicable to both the BST and CPST.

### B. CPST Rate Complaints

19. Under existing regulations, adopted pursuant to Section 623(c)(1)(B) of the Communications Act as it existed prior to the 1996 Act, subscribers were allowed to file complaints concerning CPST rates directly with the Commission.[31] Section 301(b)(1)(C) of the 1996 Act alters the manner in which the Commission reviews complaints concerning rates charged for a CPST.[32] In particular, that Section provides:

> The Commission shall review any complaint submitted by a franchising authority after the date of enactment of the Telecommunications Act of 1996 concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective, it receives subscriber complaints.[33]

20. In Appendix A hereto, we amend our rule to incorporate the self-effectuating

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[29] *See infra* at Sec. II (B).

[30] 47 C.F.R. § 76.917.

[31] See 47 C.F.R. § 76.950 ("Any subscriber, franchising authority, or other relevant state or local government entity may file with the Commission a complaint challenging the reasonableness of a cable operator's rate for cable programming service, or the reasonableness of a cable operator's charges for installation or rental of equipment used for the receipt of cable programming service").

[32] 1996 Act, § 301(b)(1)(C), *to be codified at* Communications Act, § 623(c)(3).

[33] 1996 Act, § 301(b)(1)(C), *to be codified at* Communications Act, § 623(c)(3).

language of Section 301(b)(1)(C). In addition, we have eliminated the requirement in Section 76.964 of our rules that operators notify subscribers of their right to file complaints with the Commission. Also in Section 76.964, we eliminate the requirement that operators notify subscribers of the Commission's address and phone number for purposes of filing rate complaints.[34] Subscriber complaints received by the Commission after February 8, 1996 are being returned to the subscriber with a notice of this change.

21. We also establish interim rules governing the filing of rate complaints by LFAs. Section 301(b)(a)(C) authorizes an LFA to file a rate complaint with the Commission if the LFA receives subscriber complaints within 90 days after an operator's rate increase becomes effective. Although the statute allows only LFAs to file rate complaints directly with the Commission, subscribers now have twice as long to complain about a rate increase as they did under our previous rules. We provide in this interim rule that an LFA may file rate complaints with the Commission when the LFA receives more than one subscriber complaint concerning an operator's rate increase. Modifications to the Commission cable rate complaint form, Form 329, will be made accordingly, as shown in Exhibit B. The records maintained by an LFA in accordance with its regular business practice should be sufficient to establish that the LFA received the subscriber complaints within 90 days of a rate increase.

22. If the LFA receives more than one subscriber complaint within the 90-day period and decides to file its own complaint with the Commission, it must do so no more than 180 days after the rate increase became effective. Before filing a complaint with the Commission, the LFA shall first give the cable operator written notice of its intent to do so and give the operator a minimum of 30 days to file with the LFA the relevant FCC Forms used to justify a rate increase.[35] The LFA shall then forward its complaint and the operator's response to the Commission within the 180 day deadline specified above. If the operator fails to respond, the LFA should file its complaint and specify that the operator has not filed a response. We will then decide the case based upon the information before us. This procedure shall not apply to LFA complaints filed on or before the 15th day following the release date of this item. We will address those complaints filed prior to such date on an individual basis.[36]

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[34] In the *Notice*, we seek comment on eliminating our requirement contained in 47 C.F.R. § 76.952, which states that operators must include the name, mailing address, and telephone number of the Cable Services Bureau of the Commission on monthly subscriber bills. *See infra*, Sec. III B.

[35] Where appropriate, the operator should submit to the LFA a certification that it is not subject to regulation, in lieu of rate justification forms.

[36] Of course, those complaints remain subject to the provisions of Section 301(b)(1)(c) conditioning any LFA rate complaint upon the filing of subscriber complaints with the LFA within 90 days of the CPST rate increase, and requiring the Commission to issue a final order within 90 days after it receives an LFA complaint.

## C. Small Cable Operators

### *1. Final Rule Change*

23. The 1996 Act exempts certain smaller cable systems from certain provisions of Section 623 of the Communications Act that authorize the Commission and LFAs to regulate cable rates. Specifically, Section 301(c) of the 1996 Act amends Section 623 of the Communications Act by adding the following subsection:

> (m) Special Rules For Small Companies.
>
> (1) In General. Subsections (a), (b), and (c) do not apply to a small cable operator with respect to -
>
> (A) cable programming services, or
>
> (B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994,
>
> in any franchise area in which that operator services 50,000 or fewer subscribers.
>
> (2) Definition of Small Cable Operator. For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.[37]

24. We amend our rules, as set forth in Appendix A, to reflect the exceptions to rate regulation created by section 301(c) of the 1996 Act.

25. In the accompanying *Notice*, we propose to adopt additional rules to implement Section 301(c). However, because this provision was effective upon enactment of the statute, we will establish in this *Order* interim rules to apply pending adoption of final rules.

### *2. Definition of "small cable operator"*

26. With respect to the definition of a small cable operator, and for interim purposes only, we find that there are 61,700,000 cable subscribers in the United States.[38] Therefore, an operator serving fewer than 617,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Further, to implement the small

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[37] *See* 1996 Act, § 301(c), *to be codified at* Communications Act, § 623(m).

[38] Second Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming ("*Second Annual Report*"), CS Docket No. 95-61, FCC 95-491, App. G (rel. Dec. 11, 1995).

operator provisions pending adoption of final rules, we will use the definition of "affiliate" that we adopted last year for purposes of our small system cost-of-service rules.[39] Therefore, an entity shall be deemed affiliated with a small cable operator if that entity has a 20% or greater equity interest in the operator (active or passive) or holds de jure or de facto control over the operator.[40] In the present context, we believe it is reasonable to apply our definition of affiliation as it exists under our small system rules, given that those rules and the small cable operator provisions of the 1996 Act all have the same intent of minimizing regulation and ensuring access to needed capital for smaller cable entities.[41]

*3. Scope of Deregulation*

27. Assuming an operator is eligible for deregulation under the statutory subscriber and revenue criteria, the scope of deregulation will depend, at least on an interim basis, upon the number of tiers of service that were subject to rate regulation as of December 31, 1994.[42] We believe it to be Congress' intent that any qualifying system that had only a single tier of cable service subject to regulation as of December 31, 1994 shall be exempt from rate regulation as to all of its programming services, regardless of the number of tiers it now offers.[43] By contrast, a qualifying system that had more than one tier subject to regulation as of December 31, 1994 shall remain regulated on the BST.[44]

4. Procedures

28. A cable operator that satisfies all of the relevant criteria is exempt from rate regulation as to the extent provided above effective February 8, 1996, the date the 1996 Act was enacted. If such an operator had only a single tier as of December 31, 1994, and the LFA for the franchise area in which that operator offers service is certified to regulate cable rates under the 1992 Cable Act, the operator should certify in writing to such LFA that the operator meets all of the criteria for deregulation of the BST. It may make this certification at any time. Upon request of the LFA, the operator shall identify in writing all of its

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[39] 47 C.F.R. § 76.934(a).

[40] *Id.*

[41] The small system definition of "affiliate" that we adopt here was derived from the definition set forth in Title VI, 47 U.S.C. 522(2), a definition which remains unaltered despite the inclusion of a separate definition of "affiliate" set forth in the 1996 Act for other purposes. *See supra* at para. 16.

[42] *See* 1996 Act, § 301(c), *to be codified at* Communications Act, § 623(m)(1).

[43] *Id.*

[44] *Id.*

affiliates that provide cable service, the total cable subscriber base of itself and each affiliate, and the aggregate gross revenues of all its cable and non-cable affiliates. Within 90 days of the original certification, the LFA shall determine whether the operator qualifies for deregulation and shall notify the operator in writing of its decision, although this 90-day period shall be tolled for so long as it take the operator to respond to a proper request for information by the LFA. If the LFA finds that the operator does not qualify for deregulation, its notice shall state the grounds for that decision. The operator may challenge that decision by filing an appeal with the Commission within 30 days.

29. Once the operator has certified its eligibility for deregulation on the BST, the LFA shall not prohibit the operator from taking a rate increase and shall not order the operator to make any refunds, unless and until the LFA has rejected the certification in a final order that is no longer subject to appeal or that the Commission has affirmed. Thus, the operator may take rate increases while its certification is pending. However, the operator shall be liable for refunds for the revenues it gains (beyond those revenues that it could have gained under regulation) as a result of any rate increase taken during the period in which it claimed to be deregulated, plus interest, in the event it is later found not to be deregulated. In addition, the running of the standard one-year limitation on refund liability will be tolled during that period to ensure that the filing of an invalid small operator certification does not reduce any refund liability that the operator otherwise would incur.[45]

30. A system that qualifies under the new small operator subscriber and revenue requirements and that had more than one tier as of December 31, 1994 is deregulated on all its CPSTs as of February 8, 1996. Within 30 days of being served with a LFA's notice that it intends to file a CPST rate complaint, such an operator shall certify to the LFA that it meets the relevant small operator criteria, in accordance with the new CPST rate complaint procedure described above.[46] This certification shall be in lieu of the rate justification that an operator otherwise would submit. The LFA may either resolve the issue itself in accordance with the procedures set forth immediately above, or it may forward its notice and the operator's response for Commission review in accordance with the new procedures for CPST rate complaints.[47] No certification is necessary if the operator does not receive notice that the LFA intends to file a CPST rate complaint. If a pending CPST rate complaint was filed with the Commission before the effective date of these interim rules, the operator should file its certification of small operator status directly with the Commission within 15 days of that effective date.

31. We adopt these interim rules solely for the purpose of implementing Section 301(c) of the 1996 Act pending our adoption of final rules. These interim rules in no way

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[45] *See* 47 C.F.R. § 76.942.

[46] *See supra* at Sec. II, B.

[47] *See supra* at para. 21-22.

alter or amend our small system cost-of-service rules or any other rules applicable to small systems or small cable companies, except to the extent such rules no longer apply to systems deregulated under Section 301(c) of the 1996 Act.

*4. Relationship With Preexisting Small System Rules*

32. In the interests of eliminating confusion and uncertainty, we will summarize the separate treatment available to small systems as defined by our preexisting rules. Last year, the Commission adopted rules streamlining cost-of-service rate regulation for any system serving fewer than 15,000 subscribers (a "small system"), as long as the system is owned by an operator that serves no more than 400,000 subscribers over all of its systems (a "small cable company").[48] Once a system qualifies under these criteria, it remains subject to the relaxed rules for so long as the system serves fewer than 15,000 subscribers, even if the company later exceeds 400,000 subscribers or if the small system is acquired by an operator with more than 400,000 subscribers.[49] When the system exceeds 15,000 subscribers, it may maintain its current rates but cannot seek an increase until such an increase is permitted under our standard rate rules applicable to systems generally.[50] Our small system rules are unaffected by the 1996 Act or this rulemaking.

**D. Uniform Rate Requirement**

33. Prior to enactment of the 1996 Act, Section 623(d) of the Communications Act provided in full: "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." Section 76.984 of the Commission's rules was adopted to implement this requirement.[51] The Commission interpreted the rules (and the statutory requirement) as applying to systems not facing effective competition as well as to those facing effective competition.[52] Upon review, the court in *Time Warner Entertainment Co. v. FCC* found this interpretation to be incorrect, holding that "[a]pplication of the uniform rate provision to

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[48] *Sixth Report and Order and Eleventh Order on Reconsideration* in MM Docket Nos. 92-266 & 93-215, FCC 95-196, 10 FCC Rcd 7393 (1995) ("*Small System Order*"); *see* 47 C.F.R. § 76.934(h). Obviously, a large number of systems in this category will qualify for partial or total deregulation under the small cable operator provisions of the 1996 Act.

[49] *Small System Order*, 10 FCC Rcd at 7413.

[50] *Id.* at 7428.

[51] 47 C.F.R. § 76.984.

[52] *Third Order on Reconsideration* in MM Docket Nos. 92-266 & 92-262, FCC 94-40, 9 FCC Rcd 4316, 4327 (1994).

competitive systems violates 47 U.S.C. §543(a)(2). . . ."[53]

34. Section 301(b)(2) of the 1996 Act addresses the uniform rate structure through a statutory amendment which, in relevant part, is consistent with the action of the court. It amends the uniform rate provision by adding the following at the end of Section 623(d):

> This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.[54]

35. Accordingly, in Appendix A we amend Section 76.984 of our rules to conform to the new statutory language.

36. In the *Notice*, we seek comment as to several aspects of this amendment, including whether we need to implement procedures to govern the complaint process established by Section 301(b)(2) of the 1996 Act. Until final rules are adopted, such complaints shall be governed by the provisions of Section 76.7 of our rules applicable to petitions for special relief generally.[55]

### E. Subscriber Notice

37. Section 301(g) of the 1996 Act adds a new subsection to Section 632 of the Communications Act. The new subsection reads as follows:

> Subscriber Notice. A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding section 623(b)(6) or any other provision of this Act, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax assessment, or

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[53] 56 F. 3d 151, 190 (D.C. Cir. 1995). This case is pending before the Commission on remand.

[54] 1996 Act, § 301(b)(2), *to be codified at* Communications Act, § 623(d).

[55] 47 C.F.R. § 76.7

charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.[56]

38. Accordingly, as shown in Appendix A, we modify our rules pursuant to Section 301(g) of the 1996 Act to provide that a cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion, and that a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.[57]

39. We note that previously the Commission distinguished written notice sent to subscribers from written announcements on the cable system or in the newspaper.[58] We made these distinctions in an effort to ensure that notice was adequate depending upon the circumstances. We now note the legislative history of the House amendment, which was ultimately adopted by the Conference Committee, states that "[n]otice need not be inserted in the subscriber's bill."[59] Given the cited statutory provision and its legislative history, a change in our current rules is justified so that notice provided through written announcements on the cable system or in the newspaper will be presumed sufficient. We believe this furthers congressional intent regarding the adequacy of any required notice. We will address any disputes that may arise in this area on a case-by-case basis.

### F. Technical Standards

40. Pursuant to Section 624(e) of the Communications Act, the Commission has adopted technical standards that govern the picture quality performance of cable television systems.[60] Prior to enactment of the 1996 Act, Section 624(e) provided, in part:

> A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent

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[56] 1996 Act, § 310(g), *to be codified at* Communications Act, § 632(c).

[57] We will amend 47 C.F.R. §§ 76.933, 76.964 accordingly.

[58] *See* 47 C.F.R. 76.964(c); *see also, Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5713-14 (1993).

[59] Conference Report at 169.

[60] *See* 47 C.F.R., Part 76, Subpart K.

than the standards prescribed by the Commission under this subsection.[61]

41. Section 301(e) of the 1996 Act strikes the above two sentences and adds the following:

> No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.[62]

42. As set forth in Appendix A, we eliminate the language in Note Six to Section 76.605 of our rules which permitted a franchising authority to apply to the Commission for a waiver to impose cable technical standards that are more stringent than the standards prescribed by the Commission.[63] We insert the new language from Section 301(e) in Note Six. In the *Notice*, we seek comment regarding any additional issues.

### G. Buy Out Prohibitions

43. Section 302(a) of the 1996 Act creates a new Section 652 of the Communications Act that provides as follows:

> (a) Acquisitions By Carriers. No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.
> (b) Acquisitions By Cable Operators. No cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area.
> (c) Joint Ventures. A local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services

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[61] Communications Act, § 624(e).

[62] 1996 Act, § 301(e), *to be codified at* Communications Act, § 624(e).

[63] *See Memorandum Opinion and Order*, DA 92-260, CSR-4291-Z (released February 29, 1996). In that item, the Cable Services Bureau concluded that state and local laws prohibiting the use of converter boxes were preempted by Section 301(e) of the 1996 Act.

within such market.

(d) Exceptions.

(1) Rural Systems. Notwithstanding subsections (a), (b), and (c) of this section, a local exchange carrier (with respect to a cable system located in its telephone service area) and a cable operator (with respect to the facilities of a local exchange carrier used to provide telephone exchange service in its cable franchise area) may obtain a controlling interest in, management interest in, or enter into a joint venture or partnership with the operator of such system or facilities for the use of such system or facilities to the extent that-

(A) such system or facilities only serve incorporated or unincorporated -

(i) places or territories that have fewer than 35,000 inhabitants; and

(ii) are outside an urbanized area, as defined by the Bureau of the Census; and

(B) in the case of a local exchange carrier, such system, in the aggregate with any other system in which such carrier has an interest, serves less than 10 percent of the households in the telephone service area of such carrier.

(2) Joint Use. Notwithstanding subsection (c), a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission.

(3) Acquisitions in Competitive Markets. Notwithstanding subsections (a) and (c), a local exchange carrier may obtain a controlling interest in, or form a joint venture or other partnership with, or provide financing to, a cable system (hereinafter in this paragraph referred to as "the subject cable system") if-

(A) the subject cable system operates in a television market that is not in the top 25 markets, and such market has more than 1 cable system operator, and the subject cable system is not the cable system with the most subscribers in such television market;

(B) the subject cable system and the cable system with the most subscribers in such television market held on May 1, 1995, cable television franchises from the largest municipality in the television market and the boundaries of such franchises were identical on such date;

(C) the subject cable system is not owned by or under common ownership or control of any one of the 50 cable system operators with the most subscribers as such operators existed on May 1, 1995; and

(D) the system with the most subscribers in the television market is owned by or under common ownership or control of any one of the 10 largest cable system operators as such operators existed on May 1, 1995.

(4) Exempt Cable Systems. Subsection (a) does not apply to any cable system if-

(A) the cable system serves no more than 17,000 cable subscribers, of which no less than 8,000 live within an urban area, and no less than 6,000 live within a nonurbanized area as of June 1, 1995;

(B) the cable system is not owned by, or under common ownership or control with, any of the 50 largest cable system operators in existence on June 1, 1995; and

(C) the cable system operates in a television market that was not in the top 100 television markets as of June 1, 1995.

(5) Small Cable Systems In Nonurban Areas. Notwithstanding subsections (a) and (c), a local exchange carrier with less than $100,000,000 in annual operating revenues (or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier) may purchase or otherwise acquire more than a 10 percent financial interest in, or any management interest in, or enter into a joint venture or partnership with, any cable system within the local exchange carrier's telephone service area that serves no more than 20,000 cable subscribers, if no more than 12,000 of those subscribers live within an urbanized area, as defined by the Bureau of the Census.

(6) Waivers. The Commission may waive the restrictions of subsections (a), (b), or (c) only if:

(A) the Commission determines that, because of the nature of the market served by the affected cable system or facilities used to provide telephone exchange service-

(i) the affected cable operator or local exchange carrier would be subjected to undue economic distress by the enforcement of such provisions;

(ii) the system or facilities would not be economically viable if such provisions were enforced; or

(iii) the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served; and

(B) the local franchising authority approves of such waiver.

(e) Definition Of Telephone Service Area. For purposes of this section, the term "telephone service area" when used in connection with a common carrier subject in whole or in part to title II of this Act means the area within which such carrier provided telephone exchange service as of January 1, 1993, but if any common carrier after such date transfers its telephone exchange service facilities to another common carrier, the area to which such facilities provide telephone exchange service shall be treated as part of the telephone service area of the acquiring common carrier and not of the selling common carrier.

44. Accordingly, as set forth in Appendix A, we add a new section to our rules regarding the ownership of cable systems to incorporate the provisions of Section 302(a) of the 1996 Act described above.

45. With respect to the joint use provisions of Section 302(a), the Commission will make such determinations on a case-by-case basis using the following procedures in accordance with Section 76.7 of our rules. Within ten days of final execution of a contract permitting a local exchange carrier to use that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, the parties shall submit a copy of such contract, along with an explanation of how such contract is reasonably limited in scope and duration, to the Commission for review. The parties shall serve a copy of this submission on the LFA, along with a notice of the deadline by which the LFA must file comments, if any, with the Commission. Based upon the record before it, the Commission shall then determine whether the local exchange carrier's use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user is reasonably limited in scope and duration. In determining whether such use is reasonably limited in scope and duration, the Commission will look to the underlying policy goals of the legislation: to promote competition in both services and facilities, and to encourage long-term investment in the infrastructure.

### H. Program Access

46. Section 628 of the Communications Act governs access to programming. These program access provisions are intended to eliminate unfair competitive practices and facilitate competition by providing competitive access to certain defined categories of programming. Generally speaking, the restrictions in Section 628 are applicable to cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors. The Commission rules implementing Section 628 appear at Section 76.1000 et seq.[64]

47. Section 301(j) of the 1996 Act amends section 628 by adding the following:

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[64] 47 C.F.R. § 76.1000 et seq.

> (j) Common Carriers. -- Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this subsection, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company).

48. Accordingly, in Appendix A we add a new section to the program access rules to broaden their scope as described above. We also note that the meaning of the term "attributable interest" as defined in our program access rules shall also apply to common carriers, subject to the last sentence of Section 301(j) of the 1996 Act, for purposes of program access.[65]

### I. Sunset of Upper Tier Rate Regulation

49. Consistent with the 1992 Cable Act, the Commission established rules to ensure that rates for cable programming services are not unreasonable.[66] The 1996 Act adds a provision to the Communications Act that provides a sunset date for regulation of CPST rates. Specifically, rate regulation "shall not apply to cable programming services provided after March 31, 1999."[67]

50. Accordingly, to implement this mandate, we are amending our rules as set forth in Appendix A to include the statutory sunset provision.

### J. Definition of "Cable System"

51. Prior to enactment of the 1996 Act, and subject to four specific exceptions, Section 602(7) of the Communications Act defined the term "cable system" to include:

> a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . .

52. The four exceptions to this definition included

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[65] 47 C.F.R. § 76.1000(b).

[66] 47 C.F.R. § 76.922.

[67] 1996 Act, § 301(b)(4). *to be codified at* Communications Act, § 623(c)(4).

> . . . (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right of way; [and] (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers . . . .[68]

53. This statutory definition and the four exceptions were incorporated into Section 76.5(a) of the Commission's rules.[69]

54. The 1996 Act revises the definition of a cable system by amending the two exceptions cited above and by adding a third exception. Section 301 of the 1996 Act amends the first exception cited above, subsection (B), by striking the quoted language and inserting the following: "(B) a facility that serves subscribers without using any public right-of-way."[70] Section 302 of the 1996 Act amends the second exception quoted above, subsection (C), by adding the following clause at the end of that subsection: ", unless the extent of such use is solely to provide interactive on-demand services."[71] In addition, Section 302 creates a new exception to the cable systems definition as follows: "(D) an open video system that complies with section 653 of this title."[72] Finally, Section 302 of the 1996 Act moves what had been the fourth exception, subsection (D), to new subsection (E) of section 602(7) of the Communications Act.[73]

55. In order to conform Section 76.5(a) to the new statutory definition, it is amended as reflected in Appendix A.

56. Section 302 of the 1996 Act also adds the following definition corresponding to one of the exceptions to the cable system definition:

> the term "interactive on-demand services" means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming

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[68] Communications Act, § 602(7) (amended).

[69] 47 C.F.R. § 76.5(a).

[70] 1996 Act, § 301(a)(2), *to be codified at* Communications Act, § 602(7).

[71] *Id.*, § 302(b)(2)(A), *to be codified at* Communications Act, § 602(7).

[72] *Id.*

[73] *Id.*

prescheduled by the programming provider;[74]

57. Section 76.5 of our rules is amended to add this definition.

### K. Definition of "Cable Service"

58. Section 602(6) of the Communications Act defines the term "cable service." Cable service is also defined in Section 76.5(ff) of the rules. The 1996 Act amends that statutory definition by adding the bracketed words:

> (ff) Cable service. The one-way transmission to subscribers of video programming, or other programming service; and, subscriber interaction, if any, which is required for the selection [or use] of such video programming or other programming service. For the purposes of this definition, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other programming service" is information that a cable operator makes available to all subscribers generally.[75]

59. According to the legislative history of this provision, it

> reflects the evolution of cable to include interactive services such as game channels, information services made available to subscribers by the cable operator, and enhanced services. This amendment is not intended to affect Federal or State regulations of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.[76]

60. In order to conform Section 76.5(ff) to the new statutory definition, it is amended as reflected in Appendix A.

### L. Cable Operator Refusal To Carry Certain Programming

61. Sec. 506(a) of the 1996 Act amends Sec. 611(e) of the Communications Act, which governs public, educational, and governmental access channels, by providing that "a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity."

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[74] *Id.*, § 302(b)(2)(C), *to be codified at* Communications Act, § 602(12).

[75] *Id.*, § 301(a)(1), *to be codified at* Communications Act, § 602(6)(B).

[76] Conference Report at 169.

62. Therefore, we amend the first sentence of Section 76.702 of the Commission's rules by adding the bracketed language:

> Any cable operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, indecent material as defined in § 76.701(g), [nudity], or material soliciting or promoting unlawful conduct.

63. The 1996 Act contains a similar provision concerning programming provided over leased access channels. Specifically, Section 506(b) of the 1996 Act amends Section 612(c)(2) of the Communications Act, which restricts a cable operator's exercise of editorial control over leased access programming, to provide that "a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity . . . ."

64. However, the 1996 Act does not alter Section 612(h) of the Communications Act which permits a cable operator

> to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities of organs in a patently offensive manner as measured by contemporary community standards.

65. Section 76.701(a) of the Commission's rules parallels Section 612(h) of the 1996 Act. The remaining subsections of Section 76.701 contain related provisions. Under sections 76.701(b) and (c), an operator that chooses to carry leased access programming falling within the description contained in Section 76.701(a) must place all such programming on channels made available only to subscribers who have made a written request for the program and have certified to being at least 18 years old. Subsections (d) and (e) require a person providing leased access programming to identify, upon request of the cable operator, any indecent programming or to certify that the programming is not indecent or obscene. Subsection (f) permits the cable operator to withhold access from a program provider that does not comply with an operator request made under this rule. Subsection (g) defines "indecent programming" and subsection (h) requires operators to maintain records verifying their compliance with these rules.

66. Reading the amended version of Section 612(c)(2) of the Communications Act together with the pre-existing provisions of Section 612(h), we amend Section 76.701 such that its various subsections now apply to "any leased access program or portion of a leased access program which the cable operator reasonably believes contains obscenity, indecency, or nudity." In the *Notice*, we seek comment regarding the proper construction of the word "nudity."